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No. 98-916

Supreme Court, U.S.
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In The

Supreme Court of the United States
October Term, 1998

ALLISON DEAS,

Petitioner,

v.

RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; and STROTHER P. LINDSEY-DIXON,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT, RIVER WEST, L.P. IN OPPOSITION TO MOTION OF EPILEPSY FOUNDATION TO FILE AMICUS CURIAE BRIEF

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BRIEF IN OPPOSITION TO MOTION OF
EPILEPSY FOUNDATION TO FILE AMICUS CURIAE BRIEF

MAY IT PLEASE THE COURT:

The Epilepsy Foundation of America ("EFA") has filed a "Motion For Permission To File Brief Amicus Curiae" in support of the petitioner's application. Respondent, RIVER WEST, L.P., strenuously opposes the filing of such a brief, for the reasons set forth below:

I. THE PROPOSED AMICUS CURIAE BRIEF IGNORES THE RECORD AND DISTORTS THE ISSUES IN THIS CASE.

A substantial portion of the proposed brief is devoted to a discussion of epilepsy generally. This ignores the fact that *in this case* there was no evidence of any medical diagnosis whatsoever, much less to say nothing of a diagnosis of "epilepsy." The Fifth Circuit Court of Appeal noted this at footnote 17 of its opinion (Deas' App. p. 14). The court noted in the opinion itself that, "'[s]eizures' is quite simply too broad and too amorphous a term to be useful in describing a class of impairments that is to receive *per se* treatment[17]".

In the footnote to the foregoing statement, the court discusses medical aspects of "seizures" generally. It was the conclusion of the court, with which respondent agrees, that *per se* disability status should not be afforded "seizures." Nowhere in the record of this case is there any evidence of any medical diagnosis whatsoever, and certainly no medical diagnosis of "epilepsy."

As such, the emphasis of the EFA is misplaced, and its brief is not applicable to this case and would confuse and distort the issues.

II. THE PROPOSED AMICUS CURIAE BRIEF ASKS THIS COURT TO DECIDE THIS CASE ON THE BASIS OF MATTERS NOT MADE PART OF THE RECORD.

The brief's discussion of epilepsy and seizures simply constitutes evidence in the nature of expert testimony, not subject to cross examination, which was not adduced by the plaintiff/petitioner in the trial court. Nor, it is submitted, could such testimony been adduced, for the reasons outlined in Section I of this brief in opposition. Neither did plaintiff attempt to introduce expert testimony about plaintiff's condition and its apprehension by the general public, nor was the reference made to any textual materials or learned treatises with the same information as now presented in this brief. Inasmuch as the considerations placed before this court by the EFA constitute expert opinion, they should not be considered, since plaintiff could have sought to introduce expert opinion at the level of the trial court, but did not.

Inasmuch as the information contained in the proposed amicus brief attempts to characterize plaintiff's condition as something which it is not, and to introduce further evidence about that condition and its apprehension by the public, same constitutes additional evidence outside the record, introduced for the first time before this court, and thereby further distorts the issues in the record in this case. The brief should not be considered for those reasons.

III. SUBSTANTIVELY, THE BRIEF IS A MERE REITERATION OF PETITIONER'S POSITION.

Insofar as the proposed amicus brief does discuss those issues germane to this case, it merely repeats the position of the petitioner and adds nothing contributory. Essentially, the EFA argues, as Deas does, that a person with seizures is not perceived as impaired but disabled, and further that the

fact of the termination of an individual with seizures "raises a presumption that the employer regarded the individual as having a substantially limiting impairment . . ."

These arguments were raised by petitioner and responded to by this respondent, and their assertion by the EFA contributes nothing to the resolution or decision of this case.

Moreover, the EFA's position appears to be that "The final determination of Ms. Deas' entitlement to ADA protection can only be made after a fact finder has an opportunity to consider the evidence presented (Brief p. 11)". In fact, all of the evidence on the question was presented at the trial court level and decided by the court in a summary judgment setting, in a case which was to be tried to the court without a jury. The EFA's position adds nothing to this case.

IV. CONCLUSION.

For these reasons, then, the motion of the EFA to file an amicus curiae brief should be denied.

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